
IN THE
Supreme Court of the United States
OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

No. 610

EMANUEL WEISS,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

No. 619

LOUIS CAPONE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITIONERS' REPLY BRIEF

I. MAURICE WORMSER,

J. BERTRAM WEGMAN,

Counsel for Petitioner Buchalter.

ARTHUR GARFIELD HAYS,

JOHN SCHULMAN,

GERALD WEATHERLY,

Counsel for Petitioner Weiss.

SYDNEY ROSENTHAL,

BENJ. J. JACOBSON,

Counsel for Petitioner Capone.

INDEX

	Page
Replying to Respondents' Brief, page 6.....	1
Reply to page 7.....	2
Reply to pages 9 and 10.....	3
Reply to page 13.....	4
Reply to page 14.....	4
Reply to pages 15-17.....	5
The Jury Panel.....	5
Reply to pages 18 and 19.....	5
The Trial Jury.....	7
Reply to pages 19 and 20.....	7
Reply to pages 20-23.....	13
The Last Three Jurors.....	13
Reply to pages 23-26.....	13
The Court's Conduct in the Selection of the Jury.....	15
Reply to pages 26-27.....	15
Replying to page 28.....	16
Reply to pages 40 and 49.....	17
Suppression of Evidence.....	18
Reply to pages 29-33.....	18
Show of Force.....	22
Reply to pages 33-37.....	22
Prosecutor's Summation and the Court's Charge to the Jury.....	23
Reply to pages 37-38.....	23
The Defense.....	24
Reply to pages 38-39.....	24
Review by the Court of Appeals.....	24
Reply to pages 40-41.....	24
Argument.....	25
Reply to page 51.....	25
Denial of Separate Trial to Capone.....	26
Reply to pages 48-49.....	26
The Question Before this Court is not one of mere error but of denial of due process.....	27
Conclusion.....	35

CITATIONS

Cases:

Avery v. Alabama, 308 U. S. 444.....	32
Brown v. Mississippi, 297 U. S. 278.....	36
Cissna v. Tennessee, 246 U. S. 289, 293-294.....	26
Commonwealth v. Capalla (1936) 322 Pa. 200, 205-206.....	28
Commonwealth v. Ronello (1916), 251 Pa. 329, 339.....	28
Capital City Dairy Company v. Ohio, 183 U. S. 238, 244.....	26
Chambers v. Florida, 309 U. S. 227.....	31, 36
Chicago, Burlington & Railroad v. Chicago, 166 U. S. 226.....	26
Dewey v. Des Moines, 173 U. S. 193, 199.....	26
Edward Guerin, case of 23 Cohen's Criminal Appeal Cases, 39.....	22
Green Bay & Company v. Patten Paper Company, 172 U. S. 58, 67-68.....	25
Honeyman v. Hanan, 300 U. S. 14.....	26
Johnson v. Zerbst, 304 U. S. 458.....	33
Jasenba v. California, 314 U. S. 219.....	32
Mallinckrodt Chemical Works v. St. Louis, 238 U. S. 41, 49.....	26
Moore v. Dempsey, 261 U. S. 86.....	30, 36
Mooney v. Holohan, 294 U. S. 103.....	31, 36
Nardone v. U. S., 308 U. S. 338, 340.....	21
Palko v. Connecticut, 302 U. S. 319, 325.....	32
People v. Crum, 272 N. Y. 348, 349-50.....	25
People v. Gaffey, 182 N. Y. 257, 259.....	25
People v. Kehlmeier, 284 N. Y. 366.....	21

Peo. ex rel. Lemon v. Supreme Court, 245 N. Y. 24	20
People v. McQuade, 110 N. Y. 284	14
People v. Black (1925), 317 Ill. 603, 619	28
People v. Rothe (1934), 358 Ill. 52, 56	28
People v. De Martine (1923), 205 App. Div. 80, 84	28
People v. Bigg (1941), 297 Mich. 56, 68	28
People v. O'Regan (1927), 221 App. Div. 311, 338	28
Powell v. Brunswick County, 150 U. S. 433, 440	26
Powell v. Alabama, 287 U. S. 45	32, 36
Rawlins v. George, 201 U. S. 638, 639	27, 35
Rex v. Hailam, 4 T. R. (Durnford & East) 691	20
Rector v. City Deposit Bank, 200 U. S. 405, 412	26
San Jose Land & Water Company v. San Jose Ranch Co., 189 U. S. 177, 179-180	26
Sayward v. Denny, 158 U. S. 180	26
Stilson v. United States, 250 U. S. 583	26
Stroud v. U. S. 251 U. S. 15, 20	17
Spies v. Illinois, 123 U. S. 131, 170	35
Whitney v. California, 274 U. S. 357, 360-362	26
Ward v. Texas, 316 U. S. 547, 550	32

Miscellaneous:

Sec. 374-a New York Civil Practice Act	21
Sec. 377, New York Code of Criminal Procedure	14
Sec. 392, Code of Criminal Procedure	21

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMMANUEL WEISS, and LOUIS CAPONE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITIONERS' REPLY BRIEF

The Court having granted permission for the submission of a reply brief, our effort will be to dissect and answer the statements in the respondent's brief, in the order there set forth, so that the Court may determine whether the picture portrayed therein is accurate.

There has been submitted to the Court a memorandum on behalf of the petitioners comparing some of the statements made on argument by the prosecutor, with excerpts from the record which establish their inaccuracy and misleading nature.

Except where required for clarity, repetition of anything set forth in the petitioners' briefs and memorandum will be carefully avoided.

REPLYING TO RESPONDENT'S BRIEF, PAGE 6:

In footnote 3 respondent disputes our statement that testimony of members of the Rosen family was stricken. There may be some confusion, but the last word of the Court was (R. 3913):

"Berger's testimony is also applicable to Buchalter on the alleged events leading up to and caus-

ing the Rosen murder. Others who have testified for the People on this point are Rubin, Sylvia Greenspan, nee Rosen, and, very slightly, by Harold Rosen, and also by the decedent's widow. I shall not review this. It covers quite a ramified field, but I charge you as follows:

"The testimony by members of the Rosen family as to the financial status of the business is too sketchy to have value as evidence. For that reason it has been stricken out." (Emphasis added.)

The testimony of Maguire, Aman and Bell did not relate at all to the murder of Rosen, but was merely offered in attempted proof of flight from which an inference of guilt might be drawn. But this testimony was *not connected with the crime charged*.

Unquestionably, not a single one of these witnesses' testimony was in any wise applicable to Capone.

REPLY TO PAGE 7:

Respondent says: "In connection with investigations that were being conducted by the authorities Mr. Maguire, in Buchalter's presence, advised Rubin not to become a fugitive from justice (R. 1761). Buchalter disagreed and told Mr. Maguire that, 'if witnesses are not available investigations collapse' (R. 1762; 289 N. Y. at p. 189)."

The record shows, however, that this alleged statement was made in the abstract and was totally disconnected from the Rosen case. Maguire's testimony on this point is fully quoted on pages 2 to 6 of petitioners' MEMORANDUM. Moreover, the record discloses that Buchalter did not disagree with Mr. Maguire's advice. Maguire testified (R. 1775):

"Q. He never said to you, in your presence, or to Rubin, in your presence, 'Get out of the jurisdiction?' A. He did not."

REPLY TO PAGES 9 AND 10:

At the bottom of page 9, running over to page 10, and in footnote 5 on page 10, respondent says that the witness Rubin denied he knew anything about the Rosen case because of "overpowering fear". The Trial Court refused to permit petitioners' counsel to see the actual statement made by Rubin to McCarthy, and made available only clipped excerpts therefrom. But the Trial Judge gave his interpretation of what was contained in the rest of this statement which we have never seen. He said (R. 2378): "The witness also failed in any way to implicate Lepke. On the other hand he did go out of his way to give assurance that if he could he would. * * * The witness did name two men as probably active participants in the killing, whose names are included in this indictment as probable killers." The Judge did not disclose the names of these two men to counsel.

Thus Rubin was willing to charge two others named in this indictment with the crime, even though he testified (R. 2384):

"Q. You don't know anything about the Rosen murder at all? A. No."

* * *

"Q. I am giving you immunity. A. I don't need immunity. I was never taken into anybody's confidence on any murder cases. That was always one thing. Where I got that other stuff from was from general conversation."

If Rubin was really overpowered by fear at that time, as now claimed, why did he accuse as "*probably active participants*", two persons (unknown to us) who are named in this same indictment and who were allegedly criminal associates of petitioners?

REPLY TO PAGE 13:

In footnote 9 on this page, Respondent has distorted the fact. Petitioners had nothing to do with the printing of the Record, and certainly did not seek to omit the affidavits mentioned. But the Respondent has wilfully omitted from the quotation supplied in the footnote, the very next sentence in the same paragraph of the Buchalter petition and brief from which he has taken the excerpt. The purpose of the omission is obvious. Respondent's insinuation is destroyed by the sentence he omitted, which we quote (Buchalter Petition and supporting brief, for certiorari, p. 50):

"All that petitioner's counsel said (Affidavit of Hyman Barshay, par. 6) was that he did not object to so much of the motion as asked that a special jury be summoned."

And that sentence was strictly accurate.

REPLY TO PAGE 14:

Respondent says, speaking of an affidavit by counsel for petitioner Buchalter: "After quoting many newspaper clippings his counsel admitted under oath that the district attorney was not responsible for the notoriety. * * *". But we quote the very next sentence of the affidavit, as follows (R. 108):

"But the fact is that they were circulated to the public with the apparent approval of the officials quoted."

In another part of the affidavit, after quoting a newspaper statement that Buchalter was reported bargaining with the District Attorney for his life, counsel said (R. 86-87):

"It is a fact, which the authorities should be very willing to acknowledge as such, that the defendant has not conferred with them, that there has been no discussion of a bargain between the defendant's attorneys or other representatives of the defendant with the District Attorney of Kings County or any of his associates or employees."

This acknowledgement was *never* made.

REPLY TO PAGES 15-17:

— In respondent's reference to the statement by Buchalter's counsel that "We are as ready as we will ever be and if we can get permission to interview Jacob Shapiro, we will not delay the trial one minute," respondent omits the context preceding it, which is most material and is fully quoted on page 11 of petitioners' MEMORANDUM.

The suggestion in the footnote on page 17 (#12) that "it is significant that Shapiro was not called as a witness" is misleading. It was never said by Buchalter's counsel that Shapiro was wanted as a *witness*.

THE JURY PANEL

REPLY TO PAGES 18 and 19:

Respondent at the foot of page 18 quotes a statement of the Court, "Should a new panel be desired, counsel for all the defendants should agree on that" (V. 45), and continues on page 19 with a statement that petitioners did not accept the Court's offer to discharge the panel. The inference of his statement is that we are *now*, for the first time, complaining about the prejudice. Respondent fails, however, to state the preliminary discussion with respect to the Court's offer to draw a new panel, in which petitioners urged that any new panel would be infected with the same prejudice, and in which the Court admitted the newspaper articles would be remembered "a year from

now." (See petitioners' MEMORANDUM, Item 4, pp. 7-10). The Court stated that he "would not entertain any application for the drawing of additional talesmen as long as these articles are published." The fact is, however, that the MIRROR articles continued until September 28th—two weeks after the commencement of the trial.

A complete answer to this contention of the District Attorney is found in the fact that in reality a new and additional panel of 100 talesmen was drawn in order to complete the jury. In this second panel were the jurymen Rorke, Links, Coleman, Butt (who was excused after having been drawn), and Andrews. This panel appeared before the court on October 13th (V. 1556), and the very first person examined—Harry M. Ryan (V. 1556 et seq.)—was challenged for cause for the reason that he had followed the case ~~closely~~ in the newspapers and could not give a fair and impartial verdict. The challenge was sustained (V. 1577-9). The next talesman to be examined—Alfred Elfendein—also had read the articles in the DAILY MIRROR, and expressed prejudice. He was challenged for cause, which was sustained (V. 1579; 1612-14).

Besides these two challenges for cause because of bias against petitioners there were ten additional challenges for cause—Wolff (V. 1682-94, 1698-1712), Aldrich (V. 1694-8), Marcus*, Hinze (V. 1790-4), Gierie (V. 1818-9, 1822-3), Dempsey (V. 1813, 1819-22), Long (V. 1824-27), Stites (V. 1862-4, 1876-9), Yakel (V. 1940-2) and Corning (V. 1945-58)—which were sustained against those talesmen who appeared, of the 100 summoned. As to another, Jacobus, the Court overruled the challenge and petitioners were compelled to exercise a peremptory challenge. Eight peremptory challenges were exercised: Koehler (V. 1573-7; 1596-1600, 1601, 1614-18), Pagnod (V. 1713-22, 1729-33),

* Not in index (V. 1769-71).

Jacobus (V. 1828-30, 1831, 1834-9, 1848-59), Dunphy (V. 1830-2, 1839-48), Fisher (V. 1891-99), Roberts*, Harris** and Madigan***.

In any event, how could counsel, on August 4th, forecast what the answers of these so-called special talesmen would be, and how much prejudice would be displayed by them?

THE TRIAL JURY

REPLY TO PAGES 19 AND 20:

Respondent states that the first nine jurors were pronounced "satisfactory to the defendants," and emphasizes that this was done "when their peremptory challenges had not yet been exhausted"; and that "it is inconceivable that if there were the slightest doubt about the fairness of any one of these jurors that counsel would have deliberately refrained from excusing him peremptorily." By reason of the refusal to change the venue, and the propaganda, petitioners were compelled, in proceeding to trial, either to accept the least undesirable of the men called, or, upon exhaustion of their 30 peremptory challenges, to accept the next twelve men against whom, despite apparent cause, their challenge would not be sustained. The choice was not of satisfactory jurors, but of those least prejudiced against petitioners. The argument advanced by the Respondent has no merit. If carried to its logical conclusion, petitioners would have exhausted the thirty peremptory challenges and might then have been compelled to accept 12 persons of the type of Rorke, Links and Coleman. Of course the result would have been the

* Not in index (V. 1758-61; 1766-69; 1771-76).

** Not in index (V. 1653-4; 1663-80).

*** Not in index (V. 1630-40).

same; but counsel should not be criticized for their optimism.

Respondent implies that the word "satisfactory" as used by counsel means that the jurors were really satisfactory to the defense. This is a dissimulation. In reality, the word "satisfactory" as used in trial practice in New York means merely that counsel has no legal ground for challenge and does not desire to exhaust one of his few and valuable peremptory challenges.

An analysis of the difficulty in procuring the jury completely refutes Respondent's contention. The selection of the Jury commenced September 15th. The first juror was not accepted until September 24th.

(In the following analysis the numerals in parentheses refer to the order in which talesmen were called.)

(1st juror selected Sep. 24)	Up to the point of 1st juror, 18 talesmen had been examined: 12 were excused for cause (1, 2, 3, 5, 6, 7, 11, 12, 13, 14, 16, 17) 3 peremptorily by defendant (4, 8, 18) 1 excused by court (9) 2 peremptorily by People (10, 15)
------------------------------	---

Total peremptory challenges—Defendants	3
People	2

(2nd juror selected Oct. 2)	Between 1st and 2nd jurors, 22 talesmen had been examined: 11 were excused for cause (20, 21, 23, 25, 28, 29, 31, 32, 33, 36, 37) 3 peremptorily by defendant (30, 34, 38) 4 excused by court (22; 2 men following 36, 39) 4 peremptorily by People (24, 26, 27, 35)
-----------------------------	--

Total peremptory challenges—Defendants	6
People	6

(3rd juror selected Oct. 6) Between 2nd and 3rd jurors, 9 talesmen were examined:
 2 were excused for cause (46, 49)
 4 peremptorily by defendant (41, 44, 45, 47)
 1 excused by court (42)
 2 peremptorily by People (43, 48)

Total peremptory challenges—Defendants 10
 People 8

(4th juror selected Oct. 7) Between 3rd and 4th jurors, 9 talesmen were examined:
 4 were excused for cause (51, 57, 58, 59)
 3 peremptorily by defendant (53, 54, 56)
 2 excused by the Court (52, 55)

Total peremptory challenges—Defendants 13
 People 8

(5th juror selected Oct. 7) Between 4th and 5th jurors, 10 talesmen were examined:
 6 were excused for cause (62, 64, 65, 66, 67, 68)
 2 peremptorily by defendant (69, 70)
 2 peremptorily by People (61, 63)

Total peremptory challenges—Defendants 15
 People 10

(6th juror selected Oct. 8) Between 5th and 6th jurors, 2 talesmen were examined:
 2 were excused for cause (72, 73)

Total peremptory challenges—Defendants 15
 People 10

(7th juror selected Oct. 8) Between 6th and 7th jurors, 5 talesmen were examined:
 1 was excused for cause (78)
 4 peremptorily by defendant (75, 76, 77, 79)

Total peremptory challenges—Defendants 19
 People 10

(8th juror selected Oct. 8) Between 7th and 8th jurors (8th was Stober who was subsequently excused on *Oct. 16th*) 3 talesmen were examined:
 1 was excused for cause (81)
 1 excused by the Court
 1 peremptorily by People (83)

Total peremptory challenges—Defendants 19
 People 11

(9th juror—later 8th) Between 8th and 9th jurors (9th later became 8th) 7 talesmen were examined:
 3 excused for cause (87, 90, 91)
 2 peremptorily by defendant (86, 89)
 1 excused by the court (85)
 1 peremptorily by the People (88)

Total peremptory challenges—Defendants 21
 People 12

(10th juror—later 9th) Between 9th (later 8th) and 10th (Butt) (later 9th) jurors, 16 talesmen were examined:
 12 excused for cause (93, 94, 95, 96, 97, 98, 100, 101,* 1, 2, 4, 6, 7)
 2 peremptorily by defendant (3, 5)
 1 peremptorily by the People (99)
 14th)

Total peremptory challenges—Defendants 23
 People 13

(11th juror—later 9th) Between 10th (Butt—later excused) (later 9th) and 11th (later 9th) 19 talesmen called:
 8 were excused for cause (10, 11, 14, 17, 19, 21, 22, 24)
 5 peremptorily by defendant (9, 12, 16, 25, 26)
 2 excused by the court (woman following 11, 16)
 4 peremptorily by the People (13, 15, 18, 23)

Total peremptory challenges—Defendants 28
 People 17

* This was the last talesman of the original panel; numerals following refer to the second panel.

(11th juror— later 10th— selected Oct. 16)	Between 11th (later 9th) and 11th (Rorke, later 10th) 3 talesmen were called: 1 was excused for cause (28) 2 peremptorily by defendant (29, 30)		
	Total peremptory challenges—	Defendants	30
		People	17
(12th juror— later 11th— selected Oct. 17)	Between 11th (Rorke, later 10th) and 12th (Links, later 11th) 5 talesmen were examined: 4 were excused for cause (32, 34, 35, 36) 1 peremptorily by the People (33)		
	Total peremptory challenges—	Defendants	30
		People	18
(12th juror selected Oct. 17)	No talesmen examined between Links and Coleman the last two jurors.		

Analysis of the use of the 30 peremptory challenges afforded to the petitioners:

- 10—Judge refused to excuse 10 talesmen on challenges for cause, compelling exercise of 10 peremptory challenges—Hamilton (V. 152-181); Strongin (V. 669-695); Nagle (V. 837-868); Groden (V. 868-904); Batterson (V. 926-954); Flanagan (V. 1403-21; 1435-7; 1448-50; 1454); Koehler (V. 1573-77); 1596-1600; 1601-2; 1614-18); Jacobus (V. 1828-30); 1831; 1832-9; 1848-59); Dumphy (1830-1; 1831-2; 1839-48; 1857-9);
- 11—against talesmen deemed by counsel prejudiced, but who said their impressions would not affect their deliberations—Camachi (V. 338-40); Jones (V. 568, 570, 571, 573); Finn (V. 748, 751); Ryder (V. 1065-6; 1075-6; 1077-8); Butler (V. 1438-9); Madigan (V. 1630, 1636); Harris (V. 1663-4, 1666); Pagnod

(V. 1730); Roberts (V. 1772, 1776); Pape (V. 99-100);

1—Gillespie—a friend of Head of Indictment Bureau and owner of building where body of wife of notorious gangster was found whose death he attributed to Murder, Inc. (See Main Brief, footnote on p. 26).

8—No reason noted.

30—Total.

Approximately 140 talesmen were examined over a period of five weeks. They were dealt with in the following manner:

Defendants' peremptories	30
People's peremptories	18
Jury (12 and 2 alternates)	14
Sustained for cause*	69
Alternates excused	9
	<hr/>
	140

It will be noted that only eight of petitioners' peremptory challenges were exercised without a reason appearing. Of the jurymen who actually sat upon the case—Day (V. 1113) read about the case, but had not since he was called; Gill (V. 1208) read generally about O'Dwyer on crime, and discussed the case in a casual way with a superior; Edgehill (V. 1865) read, but not in detail. Links (V. 1966, 1971-2) had formed no "extraordinary impression"; and Coleman (V. 1987) had read extensively. So that, in addition to Rorke there were five men who sat upon the jury who admitted they had in some way become familiar with the instant case.

* Three names are not in the index to Vols. VI, VII and VIII.

As a last word, the Court in its charge stated to this jury that "the fundamental statutory purpose of the special jury is to get men who are above the average of both intelligence and character." Counsel excepted to this definition and requested that the court advise the jury that "once they have been called, irrespective of their intellect, that they then become the same as any ordinary jurymen, so that they don't get a sense of exaggerated ego about their actions." The Court refused so to do.

REPLY TO PAGES 20-23:

The simple answer to Respondent's query, "why did not counsel use one of their twenty-seven peremptorily [sic] challenges" against the juror Stevens? has already been given. He was the nineteenth talesman called, and by comparison with those preceding him, seemed least unsatisfactory.

THE LAST THREE JURORS

REPLY TO PAGES 23-26:

Respondent contends that petitioners could have challenged Rorke peremptorily, instead of using the last peremptory challenge against Andrews. Respondent, ignoring the Record, asserts that Andrews' "fairness was at no time questioned." It is said to be evident "that petitioners with full and unrestricted power to challenge Rorke chose to have him as a juror."

This sophistry is illuminating. Andrews* had been summoned to the jury box before Rorke. Andrews had read about the defendants in the "Sun" and "Telegram" (V. 1908-9). When questioned by the prosecutor, Andrews had failed to disclose his close and intimate friendship with a

* His name does not appear in the index to the record of the voir dire.

number of police officers. He excused this failure by saying it had slipped his mind for the moment.

He entertained these men at his home and went out with them socially. When asked, "has this case ever been mentioned during the course of your friendship and being with those gentlemen?" he answered, "*No, I don't believe so*" (V. 1914-15).

But since he asserted that he had formed no opinion, basis for a challenge for cause was lacking. Petitioners' trial counsel would have been guileless indeed had they voluntarily accepted Andrews as a juror. Moreover, none could have anticipated that the Court would overrule the challenge for cause against Rorke when no peremptory challenges were left to petitioners. In fact, this, in substance, was specifically called to the attention of the Court by one of petitioner's counsel, who cited *People v. McQuade*, 110 N. Y. 284, as the basis for the exception (V. 1929).

On pages 25-26 respondent says that the jurors Links and Coleman were fair. We answer this on page 25 of petitioners' main brief.

On page 24, Respondent states that the talesman Rorke was challenged by the defense for "'implied bias'" (V. 1922). Mr. Rorke was not disqualified under any of the grounds specified by statute as constituting implied bias," referring to the N. Y. Code of Criminal Procedure, §377, which provides that "a juror can only be challenged for implied bias for eight specific reasons, 'and for no other,'" set forth in the appendix. This assertion is reiterated on pages 39 and 40 of Respondent's brief. The Prosecutor would have this Court believe that the juror Rorke was challenged only for "implied bias," because of his relationship with the police inspector. The baseless inference is suggested, by the quotation on page 39 from the Per Curiam opinion of the Court of Appeals, that that

Court actually passed on this challenge, since it was said to be for "implied bias." But of course the challenge was not made and could not have been made on that ground. The truth is that from the outset of this trial the Court, the Prosecutor and all counsel mislabelled challenges as for implied bias when actual bias was really meant. Actually, there was not a single challenge for implied bias (as defined by statute) throughout the voir dire. But on challenges for actual bias, frequently the word "implied" was inadvertently used instead of "actual." (See V. 554, 617, 725, 728, 862, 867, 908, 953, 1029, 1186, 1324, 1451, 1474, 1518, 1612, 1711, 1747, 1823, 1836, 1840, 1922, 1944). Finally, the Court, on this very challenge against Rorke, stated (V. 1930):

"The Court viewed the challenge as being for all purposes of bias, and consequently considered the point of alleged bias that developed."

In so ruling, the Court said it "believes its decisions to be correct and that they will stand up on appeal." This statement by the Court was in line with similar statements assuming there would be a conviction and appeal (R. 3875; 3967; 3990).

THE COURT'S CONDUCT IN THE SELECTION OF THE JURY

REPLY TO PAGES 26-27:

In an effort to controvert our contention that the Judge bludgeoned the talesmen into abjuring prejudice, Respondent cites what the Trial Judge said about giving defense abundant latitude (at the beginning of the trial, V. 49), and then says that the Judge took precautions against prejudice after the jury had been selected (V. 1981-82). Respondent then makes the bald statement that "No greater latitude could have been given defense counsel than was allowed in this case." The prosecutor is en-

tirely silent about the innumerable instances noted in petitioners' main brief, showing the contrary to be the fact. It is no answer to our contention to say merely that over four weeks were consumed in questioning jurors, and that "the transcript is over 2000 pages." That indicates, as is the fact, that prejudice was indeed rampant.

REPLYING TO PAGE 28:

Respondent argues that the Trial Court was fair because Mr. Butt, the juror who developed a prejudice after he had been seated in the box, was excused by the Court, who said: "This is in fairness to the defense."

However, the Court was ready to have the oath administered to the jury after he had asked each juror individually whether he had followed his instructions and had received from each the answer, "I have" (V. 1981-2). This answer was given by Mr. Butt, as by each other juror. Were it not for the fact that one of the counsel for petitioners then suggested that the Court ask whether anything had happened which in any way would change any of the answers the jurors had given when examined, the oath would have been administered. When that question was asked, Mr. Butt disclosed to the Court his prejudice, leaving the Court no choice but to excuse him as a juror. Yet the Court seemed to think it was a *fact* to the defense.

It needed a forceful character to acknowledge this prejudice after he had sworn when he qualified as a special juror that he would not be influenced, and again when he was examined as a juror in this case. How many of the remaining jurors lacked the moral strength to express their true opinion in view of their previous oaths is the question that persists. True it is that had it not been for the question which petitioners' counsel asked the Court to propound, Butt would have remained on this jury.

REPLY TO PAGES 40 AND 49:

Respondent states that the holding of the Court of Appeals by virtue of the Judiciary Law that "the rulings of the Trial Court upon challenges for actual bias are final and not appealable" necessarily applies to challenges for actual bias made against jurors who did not participate in the verdict. Hence, Respondent says, a false issue is raised respecting whether the decision of the Court of Appeals deprived petitioners of "the right to question the fairness and impartiality of the jury empaneled." The true contention of the petitioners appears on pages 49-53 of the main brief and will not be reiterated.

At page 48, Respondent cites the case of *Stroud v. U. S.*, 251 U. S. 15, 20. This case, however, supports the contention of petitioners that the overruling of a challenge for bias, even though the talesman did not sit upon the jury, is reviewable. In that case the defendant was entitled to 20 peremptory challenges and was overruled on one challenge for cause, necessitating the exercise of one of his peremptory challenges. The Court, however, granted him 22 peremptory challenges, which were two more than the number allowed by statute. This Court held at page 21:

"Thus his right to exercise peremptory challenges was not abridged to his prejudice by an erroneous ruling as to the challenge for cause. In view of this fact, and since there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable, we are unable to discover anything which requires a reversal upon this ground."

In addition, the Court there had excluded from the jury all persons residing within Leavenworth County, where appellant claimed prejudice existed on account of comments in the public press. In the instant case, the Court did not grant any additional challenges, but in fact over-

ruled ten proper challenges for cause. Nor did the Court in the case at bar exclude the citizens of Kings County, where the propaganda was circulated. The jury was exclusively composed of residents of Kings County.

SUPPRESSION OF EVIDENCE

REPLY TO PAGES 29-33:

On page 30 respondent quotes the Trial Judge's statement, regarding these records, as follows (R. 1882):

"If you wish you can have it marked for identification and then offer it in evidence, and if there is an objection, the Court will rule."

Not only was this not an expression of willingness to receive the reports in evidence, but this incident took place on *November 10* when the records were not in Court and could not even be marked for identification (R. 2141, 1882-3). Further discussion ceased until *November 12* when the records *were* in Court (R. 2141). Then the Court refused to allow petitioners' counsel to examine them and refused even to look at them himself (R. 2140-2153).

The record shows (R. 2147):

"Mr. Wegman: We want to see these records for two reasons: First, because in order to lay a foundation we ought to be able to cross-examine these witnesses as to places and times indicated by these records and, secondly, to call the police officers who witnessed—"

(R. 2152-3):

"The Court: The Court is not going to say any more because I do not propose to have any record that will cause an appellate court to think that that is what activates my ruling, but I am telling you it is just arrant hearsay. *You are not going to be permitted to have the inspection and I am*

not going to hear anything more." (Italics supplied.)

. . . .

"Mr. Barshay: First, your Honor, I do not know of any law which makes these police records private records. My understanding is that they are public records and I cite to you as authority the case I tried, People against Behan, where he was indicted for stealing public records, and I contended under the law there that they were private records, being under the same impression then as your Honor is now. I was overruled by the Court and the indictment was sustained and we had to go to the jury on the question of fact. Now, second, I do not know which police officers, your Honor, to subpoena because unless I know which police officer said he followed him and reported to his chief that he did follow him and said in that report whom he saw the defendant Buchalter with, at what place, at what time, at what date, I am in no position to subpoena the entire Police Department of the City of New York. Third, under the law, the law presumes that an officer of the City of New York does his duty honestly and faithfully and not that he does it by hearsay and, if in Mr. Turkus' possession or in the Police Department's possession there is evidence which gives the lie to any witness offered in this court room, as a public duty he owes it not only to the defendants but to the community to produce it.

"Mr. Turkus: Nobody finds fault with that statement. There is another—

"The Court: The Court will permit no more post mortem.

"Mr. Barshay: I take exception.

"The Court: A long time back the Court made its ruling.

"Mr. Barshay: Exception."

All questions concerning the materiality of these reports would have been obviated had the Trial Judge ex-

amined them himself. Instead, he left it to the prosecutor alone to judge the import of the documents (R. 2146), accepting the District Attorney's statement of what they contained.* There is no merit in the suggestion that confidential information not relevant to the case would have been improperly revealed. The Court could have, as he did in relation to Rubin's statement to McCarthy (R. 2378-88), taken the precaution to prevent the revelation of confidential matter, and at the same time disclose to the defendants that portion of the reports which was material and relevant to the present case.

Replying to Mr. Turkus' contention on the trial, as quoted on page 31 of respondent's brief, that these were confidential reports, we point out that these reports were not private papers or notes of the District Attorney. They were subpoenaed from the Police Department. They were public records. Nor were they papers that were not admissible in evidence. These factors distinguish the case from *People ex rel. Lemon v. Supreme Court*, 245 N. Y. 24, which concerned what the Court called "merely mnemonic instruments whereby the prosecutor may be better able to elicit evidence hereafter."

In the *Lemon* case, *supra*, the Court referred to *Rer v. Hallam*, 4 T. R. (Durnford & East) 691, decided in 1792, which it called the "point of departure" in any discussion of the subject. There the question was whether the defendant should have access to a report of a Board of

*When the Judge examined pertinent documents, they were found to be material. For example, he made available to the defense, after demand and some dispute (R. 1218-1221), the Grand Jury testimony of the witness Bernstein. The Court found therein no contradictions of his testimony at the trial (R. 1222). But there were many which were of vital importance. It was found that before the Grand Jury, Bernstein had ascribed to one Strauss (who was executed between the time of the Grand Jury testimony and the time of this trial) many acts which at the trial he said were done by either petitioner Capone or petitioner Weiss. E.g., K. 721-2, cf. 1228-30; 729, cf. 1263-4; 1266-7; 715, cf. 1228. See also, Capone's Petition for Certiorari, p. 46.

Inquiry which had examined witnesses in India. The Court said: "The practice on common law indictments and on information on particular statutes shows it to be clear that this defendant is not entitled to inspect the evidence on which the prosecution is founded *till the hour of the trial.*"

Why should not the defense, in the interests of justice, have access to police reports which might be beneficial to their case? Why the secrecy? What is the public policy involved? It was suggested that lawyers, officers of the Court, might make use of information in the reports to help other criminals. The supposition is abhorrent and revolting. A state should not be permitted to value the secrecy of police records more than human life and liberty.

These reports were admissible in evidence (although hearsay at common law) by virtue of § 374-a of the New York Civil Practice Act, made applicable by the Code of Criminal Procedure, § 392. They are in the same category as hospital records, the introduction in evidence of which was held proper in *People v. Kohlmeyer*, 284 N. Y. 366, Cf., *Nardone v. U. S.*, 308 U. S. 338, 340, where the Court said: "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land."

We submit, however, that the question whether these reports were admissible under the New York statutes is not necessarily determinative of the question before this Court. The concept of due process would require that they be admitted anyhow, and that any State law that would prevent defendants from having access thereto would violate the Federal Constitution.

The Court of Appeals in ruling on the suppression of this evidence (Resp. Br. p. 32-33) *did not say the reports*

were confidential, did not say they were irrelevant, did not say they were inadmissible as hearsay, or for any other reason, but held merely that they were inconclusive. That ruling was made without giving petitioners any opportunity to examine the reports so that the materiality might have been demonstrated.

SHOW OF FORCE

REPLY TO PAGES 33-37:

On pages 33 and 34, the respondent quotes from the summation of Buchalter's counsel (R. 3546-7; 3584-5; 3589) and says: "the stubborn fact remains that his disclosures far outweighed the conjectural prejudice which petitioners claim arose from the fact that they were brought to and from the courtroom in manacles." That same excuse was offered for the newspaper publicity. Respondent thus seeks to excuse the prejudicial effect of both the publicity and the manacling by pointing to the summation of counsel, which was a tactic of desperation made necessary by the exigencies of the situation created by that very publicity and manacling. Cf. case of *Edward Guerin*, 23 Cohen's Criminal Appeal Cases, 39.

On pages 36 and 37, respondent characterizes as "a figment of their imagination" petitioners' argument that the surrounding of prosecution witnesses by police and court officers was an "insidious suggestion to the jury" that these witnesses needed protection. The district attorney argues that this was no more than the usual procedure. He somehow overlooks the fact that when the defense objected to this show of force, the prosecutor asked (R. 687):

"Is the objection to the protection of the witness?"

PROSECUTOR'S SUMMATION AND THE COURT'S CHARGE TO THE JURY

REPLY TO PAGES 37-38:

Petitioners join in respondent's request that this Court read the summations of all counsel, portions of which are contained in petitioners' MEMORANDUM at pages 12-16. We invite particular comparison between the prosecutor's summation and the summation of Capone's counsel which immediately preceded it. The intemperate excesses of the prosecutor's summation, which the respondent calls "overforceful expression," were in sharp contrast to the calm analysis of the summation which the prosecutor attempted to answer.

It is difficult to understand the result below since, as Judge Loughran said (R. 4086):

"A majority of this court is gravely apprehensive that such diffuse departures by the trial prosecutor from legitimate argument may have unduly prejudiced the jury against the defendants." (Emphasis ours.)

On page 38 respondent quotes three brief excerpts out of a charge which covers over sixty pages of the record. These excerpts should be compared with those quoted on page 35 and pages 67-74 of petitioners' main brief. The objectionable and unfair material in the charge—e.g., "When rogues fall out" (R. 3903-4), "little white lies" (R. 3898-9), the "time-table" episode (R. 3906-7; 3989-90), "segregating evidence" (R. 3903, 3909-10, 3914, 3916), cross-examination "hit or miss" (R. 3903), "disregard" Grand Jury testimony (R. 3899-3900), to expect recollection "is an unholy thing" (R. 3894), "sloppy police work" (R. 3955-6), and alibi charge (R. 3949),—did not merely indicate a lapse or mistake, for the charge had been carefully prepared, as the Judge himself stated (R. 3773).

Of course the Court paid lip service to the proprieties, but he made sure to vitiate all possible chance that the jury might decide the case fairly. It was no cure for the prejudicial conduct of the trial and the prejudice inherent in the charge that he told the jury not to be prejudiced—at the same time that he misled them.

The Court unconsciously exposed his state of mind while delivering the charge, when an exception was taken to that portion relating to a certain prosecution witness. He said (R. 3970):

“The Court: Didn't I make a blanket charge covering all witnesses on that point? Yes, I did, distinctly.

“Mr. Climenko: At some point your Honor did.

“The Court: Yes, I did, and that covers a multitude of sins. * * *

THE DEFENSE

REPLY TO PAGES 38-39:

Respondent's reference here to petitioners' failure to take the stand is a resort to the same tactics as were employed upon the trial. (See petitioners' main brief, pp. 62-63.)

On page 39 respondent says, “Capone offered no defense whatever.” The view of Capone's counsel was and is that no defense was necessary. (See petitioner Capone's supplemental brief.)

REVIEW BY THE COURT OF APPEALS

REPLY TO PAGES 40-41:

Respondent quotes from Chief Judge Lehman's opinion, but does not quote (R. 4078): “Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind.”

Chief Judge Crane, for the New York Court of Appeals, said in *People v. Crum*, 272 N. Y. 348, 349-50:

"The Constitution of this State in article VI, section 7, provides that the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. 'This,' said the court in *People v. Gaffey* (182 N. Y. 257, 259), 'enables us to review the facts in capital cases as we always did.' A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt.

"A reading of this record causes me to hesitate. I am not convinced. I have a reasonable doubt which I shall attempt to explain and which, in my judgment, compels us to reverse this conviction and grant a new trial."

ARGUMENT

REPLY TO PAGE 51:

Respondent says that the charge fails to present any Federal question, and that the claim was not raised below.

In *Green Bay &c. Company v. Patten Paper Company*, 172 U. S. 58, 67-68, this Court said:

"But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. * * *

'If it appear from the record, by clear and nec-

essary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment, without deciding it, that will be sufficient.' *Powell v. Brunswick County*, 150 U. S. 433, 440; *Sayward v. Denny*, 158 U. S. 180; *Chicago, Burlington &c. Railroad v. Chicago*, 166 U. S. 226."

See also: *Honeyman v. Hanan*, 300 U. S. 14; *Whitney v. California*, 274 U. S. 357, 360-362; *Cissna v. Tennessee*, 246 U. S. 289, 293-294; *Mallinckrodt Chemical Works v. St. Louis*, 238 U. S. 41, 49; *San Jose Land & Water Company v. San-Jose Ranch Co.*, 189 U. S. 177, 179-180; *Capital City Dairy Company v. Ohio*, 183 U. S. 238, 244; *Rector v. City Deposit Bank*, 200 U. S. 405, 412; *Dewey v. Des Moines*, 173 U. S. 193, 199.

The opinions of the Court of Appeals of New York, as well as the remittitur, show that the Federal question of a fair trial was directly involved. See also, petitioners' MEMORANDUM, pp. 1-2. In respect of the charge, in the Motion for Re-argument below, it was squarely claimed that there was a violation of "due process." The points were also made *at the trial itself*, although counsel did not specifically refer to the Fourteenth Amendment, because the Judge said he did not want the reasons for the exceptions assigned (R. 3969). See R. 3869-70, 3985-6, 3996-7. Similar objections and exceptions in respect of the conduct of the trial appear throughout the Record.

DENIAL OF SEPARATE TRIAL TO CAPONE

REPLY TO PAGES 48-49:

In support of the contention that the denial of this petitioner's motion for a separate trial does not raise a question of due process, Respondent cites the case of *Stilson v. United States*, 250 U. S. 583. That case, however, is

not applicable to, or determinative of the question here presented. It involved the question of whether, where a severance had been denied, a ruling in a federal case that a peremptory challenge by one defendant should apply to all co-defendants was a violation of the Sixth Amendment of the Federal Constitution; and it was held that such a ruling as to a peremptory challenge was not a violation of any constitutional right. It was not held, however, that the denial of a severance in a State Court does not constitute a denial of due process.

Here our claim of deprivation of due process arising from denial of severance is not based on Capone's being forced to join others in peremptory challenges. It is claimed that this is one of the integral parts of the complete pattern woven through the trial—all of which taken together precluded a fair consideration of the evidence against *him*.

In addition, the District Attorney has it appear that this motion for a severance was denied before the trial by another Judge. This motion was not so denied; it was denied *without prejudice to renewal before the Trial Court* (R. 31-54). It was this Trial Judge who denied the numerous motions for a severance, enumerated on page 17 of this petitioner's supplemental brief.

**THE QUESTION BEFORE—THIS COURT IS NOT ONE
OF MERE ERROR BUT OF DENIAL OF DUE PROCESS**

The District Attorney would confine the doctrine of due process to the specific facts of those cases which have been considered in this Court.

We do not ask the Court to extend the doctrine of due process beyond the real meaning of the law which it has announced. We recognize the rule stated in the opinion of Mr. Justice Holmes in *Rawlins v. Georgia*, 201 U. S. 638, 639, that

"If the State Constitution and laws as construed by the State Court are consistent with the Fourteenth Amendment, we can go no further. The only question for us is, whether a state could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms."

In this test lies the distinction between error and deprivation of due process. What we claim in this case is that New York State could not by its constitution or by its statutes enacted pursuant to the constitution, authorize what happened in this case.

No state constitutional provision or other law could, within the limits of the Fourteenth Amendment, authorize a departure from those elements of fundamental fairness essential to due process. No state enactment could authorize a prosecutor to say to a jury that he was sure the defendants were guilty and that in reaching its verdict the jury should rely upon his good faith and integrity. That would make the issue depend not upon the evidence, but on faith in the honesty of public officials. That sort of thing has often been condemned. Convictions have been reversed because the district attorney called the defendant a "cold-blooded killer" (*Commonwealth v. Capalla* (1936), 322 Pa. 200, 205-206), and where he declared in effect that he would not prosecute men concerning whose innocence he had the slightest doubt (*People v. O'Regan* (1927), 221 App. Div. 311, 338).

See also *Commonwealth v. Ronello* (1916), 251 Pa. 329, 339; *People v. Black* (1925), 317 Ill. 603, 619; *People v. Rothe* (1934), 358 Ill. 52, 56; *People v. DeMartine* (1923), 205 App. Div. 80, 84; *People v. Bigg* (1941), 297 Mich. 58, 68.

Any such hypothetical statute would violate the concept of due process. Yet this is exactly what the District At-

terney did in this case. Said Prosecutor Turkus (these excerpts are from different parts of his summation):

"A hopeless case—if they did not know it when they got their retainer, there is no lawyer in the court room that does not know it, when all of the evidence was in, that there are three guilty men at this Bar of justice" (R. 3804).

"Do you think that when the investigation went on Judge O'Dwyer sat down, and out of seven million people in New York City, or out of twelve million people in New York State, he selected Lepke, Capone and Weiss for a witch hunt?" (R. 3807).

"Don't let anybody insidiously try to get you thinking about punishment. That is not your responsibility. It is their responsibility, for if they had not been three of the killers of Rosen, you would not have them sitting here" (R. 3819-3820).

"Whatever my lot in life may be, whether I go out of public office after this case or stay in, whatever the future holds for me, I say to you with all due solemnity, that nothing I have ever learned as a public prosecutor, no talent that I now enjoy, would ever be used in any way with any of you to make you feel that I had discredited you or myself, or any member of the public. And that is just for me alone. And one more thought—if I could spend the rest of my life fighting this type of a situation, I would like it" (R. 3821).

"Is the pay I get from the County of Kings tainted, in comparison to what pay they have gotten from Lepke, Capone and Weiss?" (R. 3803).

The defense had taken the position that Bernstein and the other criminals had concocted their stories. The District Attorney assumed that this charged *his Office* with a "frame-up" and then presented the issue of his own integrity, saying (R. 3803-3804):

"Is there a million dollars that would make me, a young man with the blood of life going through my veins, understanding all that it means to live and breathe—is there a million dollars that would make me frame the three of them? * * * these lawyers * * * Think of it, accusing Judge O'Dwyer and Burt Turkus and Sol Klein and Lewis Joseph and every law enforcement agent that had something to do with this case, of murder, of an attempt to kill them. That is what it is, if one-fiftieth of their insinuations are true as to the manufacturing of this case, sticking witnesses together to compare notes, and framing them. If one-fiftieth is true, take O'Dwyer, Turkus and the rest of us, tar and feather us, and run us out of town on a rail, and put us in jail. That is where we belong—not here representing the People of the State of New York." (R. 3803-3804).

Criticism was made by the District Attorney that petitioners rely upon decisions such as *Moore v. Dempsey*, 261 U. S. 86. He claims that such cases are not apposite because no physical violence was directed toward the defendants or toward the jury. But " * * * violence is not the only form of force; it comes in subtle disguises." Petitioners did not coin the phrase that the Mirror articles were "raising havoc with the jurors." That is the language of the Trial Judge after twenty-four prospective jurors had been examined (V. 460). Havoc raised with the jury panel is destructive of due process irrespective of the source of the contamination; it is the fact of the havoc that matters, not the means by which it was brought about.

The District Attorney argues that formalisms were uttered by the Judge which properly stated the law; that the jury were told that they must consider the facts in reaching their decision. Unfortunately, however, the passion and prejudice instilled during the course of a long trial and by the major portions of the charge cannot be

exercised by general, placid passages in the charge. The mischief remains.

The argument of the District Attorney that the acts of the prosecutor may be ignored is no different from the contention of the State in *Mooney v. Holohan*, 294 U. S. 103, that acts of the prosecutor cannot in themselves constitute a denial of due process. This Court, however, has held that the prosecutor is part of the machinery of justice of the State. The prosecutor in this case permitted his name to be used without objection or action on his part, without disclaimer or public denial, in articles which raised havoc with the jury, and in others upon which reliance was placed in the court room by the Court. It was therefore in part his action, and hence the State's action, which prevented an impartial jury from being selected. It was the State, acting through the prosecutor and the Court, which failed to provide the corrective process required by the Fourteenth Amendment. The Court threw up its hands, declared itself to be wholly impotent in the circumstances; and, without any rebuke to the newspapers or to the District Attorney, permitted the trial to proceed. Cf. V. 542, 837.

There was a newspaper story on May 16, 1941, the day Buchalter was arraigned (pages 11-12, petitioners' Main Brief) to the effect that Buchalter was trying to buy his life by making confessions. Denials by Buchalter (R. 86-87) were of no avail, but a public disclaimer by the District Attorney might have stifled any such publicity. Despite request therefor, there was no disavowal (R. 91, 86-87).

When denial of due process has been the issue, this Court has examined and made its own determination of the facts, even though they were disputed, and even though those facts had been found against the petitioners. In *Chambers v. Florida*, 309 U. S. 227, the Court found a confession had been extorted even though the jury had

found against the petitioners on that issue and the courts of the State had sustained the findings; so also in *Ward v. Texas*, 316 U. S. 547, 550. In *Powell v. Alabama*, 287 U. S. 45, this Court held there was no adequate representation by counsel, despite the contrary finding of the State Court. In *Lisenba v. California*, 314 U. S. 219, the Court examined the facts, and it did likewise in *Avery v. Alabama*, 308 U. S. 444.

In these cases as well as others, this Court weighed the facts, not concerning the guilt or innocence of the petitioners, but of the denial of due process. In some it held that due process had been denied. In others the holding was that the defendants' constitutional rights had not been infringed. In all instances, this Court appraised the actualities—the substance and not the form of what took place at the trial.

Just what is the substance of the right guaranteed under the Fourteenth Amendment? As this Court said through Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. 319, 325:

“The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence.”

The substance of due process is a philosophy of justice, and a conception of a way of life. It is “of the very essence of a scheme of ordered liberty.” (*Palko v. Connecticut*, *supra*.)

Surely it is a part of such a scheme that a criminal trial is not for the purpose of finding that the defendant is guilty, but of finding *whether* he is guilty. Where, as in this case, the jury panel was obviously subjected to and influenced by propaganda which the Court and the prosecutor made,

no attempt to stop, where the selection of the jury was obviously prejudicial to the petitioners, where acts of the Judge and acts of the prosecutor were directed to obtaining a conviction irrespective of the means which might be employed, one cannot say that there was an investigation of the guilt or innocence of these petitioners and therefore a trial by reason.

What is the State's obligation under the Fourteenth Amendment? The State is charged with the duty of providing a fair and impartial tribunal, prepared calmly and dispassionately to appraise the facts and only the facts bearing upon the guilt or innocence of the persons charged with crime. That tribunal does not consist of the Judge alone or of the jury alone. Judge, jury, prosecutor and defense counsel are all part of that tribunal. See *Johnson v. Zerbst*, 304 U. S. 458. The Judge must rule impartially and fairly. The jury must be unprejudiced. The prosecutor may not use his position as part of the tribunal and as the representative of the State in a manner so as improperly to influence or to impose upon the jury. By the same token, the defendants are entitled to present their defense by counsel. The mere fact that they are represented by counsel is not enough. Counsel should be entitled to cross-examine witnesses fully and to reveal the truth by showing that witnesses are testifying falsely. Destruction of the prosecution's case is as much a defense as the production of affirmative evidence to combat the accusation. The persistent, continuous and uniform efforts on the part of the Court in this case to destroy the function of defense counsel by bolstering witnesses whose perjury was revealed by cross-examination, by repression of counsel, and disparagement of their argument to the jury upon the facts, was in effect a deprivation of the right of counsel. What purpose is there in providing a defendant with the right to counsel if a court is permitted to tell

the jury that they are not to be "misled" by counsel's proper argument?

We do not urge that casual comment by a court, or occasional expression of opinion on some fact constitutes bias or partiality. A different view should be taken when there is a uniform, persistent course of conduct by which every factor favorable to the prosecution is emphasized and stressed by the Court, where every factor damaging to the prosecution is minimized, excused and condoned. In such a case it would be ignoring actualities to say that there has been a fair and impartial tribunal.

The District Attorney's admission that the trial was not "faultless" is a masterpiece of understatement. He argues that the matters complained of were mere irregularities and errors solely within the purview of the State courts and not cognizable in this Court. The difference between mere error and denial of due process, we submit, lies in the measuring rod and the subject matter which is being measured. Error is measured by the application of State law. A State may provide the kind of tribunal before which the defendant is to be tried. It may be a Judge sitting alone or it may consist of a Judge and a jury. The State may prescribe the rules of substantive law by which conduct is to be judged. A State may also prescribe the rules of evidence which govern the trial. The question whether the rules have been adhered to is one for the State Court to determine. A departure from these rules, whether it be a statute of the Legislature or law as announced by the courts, is error with which this Court is not concerned.

However, if a State law is obnoxious to the Fourteenth Amendment, it cannot stand. This Court has recognized that it is not only the law as written by the Legislature which must be measured by that Amendment, but the law in action. The law which is measured in any specific case by the yardstick of the Constitution is not the statute

enacted by the Legislature alone. It is the statute as it is construed by the Court, and as it is administered in the trial by the Court, by the District Attorney, by the jury Commissioners or by the other agencies of the State. As this Court said in *Spies v. Illinois*, 123 U. S. 131, 170, it will consider the processes by which a person is convicted of crime

"to see if in the actual administration of the rule of the statute by the Court, the rights of the defendants under the Constitution of the United States were in any way impaired or violated."

The events which improperly influenced the jury, the actions of a biased judge, and the efforts of an over-zealous prosecutor are therefore not mere errors. The Court of Appeals of the State of New York (despite vigorous dissenting opinions) has held that there is no prejudicial error in the record. Therefore, according to the laws of the State of New York, what happened at this trial is proper. This Court is now asked whether the law in the State of New York which permitted these things to happen is consonant with the Constitution. To revert to the statement in *Raulins v. George*, 201 U. S. 638, 639, the question is "whether a State could authorize the course of proceedings adopted, if that course were prescribed by its Constitution in express terms."

We urge that the Constitution forbids a State to sanction a trial such as the one which resulted in the present judgment.

CONCLUSION

Decisions of this Court, particularly in recent years, have set a standard for the conduct of criminal trials in the United States. It is not difficult to observe a pattern which would bring our procedure in line with the traditions observed in England. In many of our courts we

find the same fairness and decorum that characterize English practice. The warnings issued by the Supreme Court in recent decisions apply to trials of other kinds. The practices that have heretofore been condemned, such as mob domination of a trial (*Moore v. Dempsey*, 261 U. S. 86), the manufacture or suppression of evidence (*Mooney v. Holohan*, 294 U. S. 103), the wringing of confessions by third degree methods (*Chambers v. Florida*, 309 U. S. 227; *Brown v. Mississippi*, 297 U. S. 278), the denial of full benefit of independent counsel to a defendant (*Powell v. Alabama*, 287 U. S. 45)—such things would be unthinkable in a criminal court in England. The condemnation of such practices by our Supreme Court have raised the standards of our State courts nearer to those of British Courts.

Can one conceive of a British Court permitting newspaper publicity which would poison prospective jurors against defendants? If that were done, would any judge say that he could do nothing about it? Would a prosecutor to whom are attributed in the press statements condemnatory of the defendants, fail to disavow any such statements?

Certainly, an English prosecutor would never inject the question of his own integrity into a case; would never use that as a basis for convicting men; would never suggest, in effect, that if the defendants were not guilty, he and his associates should be tarred and feathered and run out of town on a rail for trying to frame innocent men. A British barrister would never suggest, untruthfully, that criminal witnesses had not received immunity, and would later receive their just desserts. Certainly such a suggestion would not be followed by the release of the criminal witnesses.

This Court must either approve this trial as having met the standards of fairness implicit in due process of law, and thus permit trials of this kind to continue, or, by

stamping this as an unfair trial, set standards for future State trials which will more nearly approximate Anglo-Saxon traditions. If this Court fail to reverse this judgment, the result will be treated by over-zealous judges and by over-ambitious prosecutors all over the land as an approval of methods displayed in this record. Already, among lawyers in New York, this case is discounted as representing "Buchalter law," as opposed to the noble conception cut in stone on the facade of this building, "Equal Justice Under Law."

In a civilized country, even men reputed to have led evil lives are entitled to fair trials; and on fair trials—and scrupulously fair trials—rests the protection of the innocent. What happens to these individuals, whether they live a little longer or not, is not the important question from the point of view of public policy. After all, life at most is short. The individual is mortal. But the law is eternal, and what the Court does here will influence public policy in these United States as long as our Government endures.

Respectfully submitted,

I. MAURICE WORMSER,

J. BERTRAM WEGMAN,

Counsel for Petitioner Buchalter.

ARTHUR GARFIELD HAYS,

JOHN SCHULMAN,

GERALD WEATHERLY,

Counsel for Petitioner Weiss.

SYDNEY ROSENTHAL

BENJ. J. JACOBSON,

Counsel for Petitioner Capone.